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7 Attorneys for Defendants William Tull, Daniel Gibby and
 8 Gibby Novelties, LLC

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

13 PAUL MONTWILLO, an individual) CASE NO. C 07 3947 SI
 14 Plaintiff,) Declaration of David Y. Wong in Support of
 15 vs.) Reply to Plaintiff's Opposition to Motion for
 16 WILLIAM TULL; DANIEL GIBBY;) Summary Judgment of Defendants William Tull,
 17 GIBBY NOVELTIES, LLC dba ARSENIC) Daniel Gibby and Gibby Novelties, LLC
 18 & APPLE PIE, a California Limited) (**FRCP RULE 56(C)**)
 19 Liability Corporation and DOES 1 through) April 25, 2008
 20, inclusive,) 9:00 a.m.
 21 Defendants.) Judge Illston, Courtroom 10
 22

And related Counter-Claim) The Federal Building
 23) 450 Golden Gate Avenue
 24) San Francisco, CA 94102

25
 26
 27 Complaint filed: August 1, 2007
 28

I, David Y. Wong, declare:

1. I am an attorney licensed by the State of California, admitted to practice before this

Court since 1982, and I am co-counsel for Defendants William Tull, Daniel Gibby and
 MONTWILL V. TULL, ET AL. USDC Action No. C 07 3947 SI

Declaration of Wong –Reply to Opposition to Defendant's Motion for Summary Judgment

1 Gibby Novelties, LLC. I am authorized by my clients to make this Declaration in support of their
2 Motion for Summary Judgment, filed herewith.

3 2. On April 4, 2008, I received an electronic notice from this Court advising that Plaintiff had
4 filed a Declaration in Opposition to Defendants' Motion for Summary Judgment, the deadline set
5 by the Court in its Pretrial Scheduling Orders;

6 3. On April 4, 2008, I did not receive notice, electronically or otherwise from the Court or
7 Plaintiff's Counsel, of the filing of Plaintiff's Memorandum of Points and Authorities in Opposition
8 to Defendants' Motion for Summary Judgment.;

9 4. On April 4, 2008, I received an electronic e-mail from Plaintiff's Counsel in which he
10 attached a copy of his Declaration in Opposition to Defendants' Summary Judgment Motion and
11 a copy of Defendants' Opposition to Plaintiff's Motion for Summary Judgment;

12 5. On April 7, 2008, I advised Plaintiff's Counsel that his e-mail of April 4 did not contain
13 Plaintiff's Opposition and asked that it be sent. A copy was received by e-mail that evening;

14 6. On April 8, 2008, I advised Plaintiff's Counsel that it appeared that Plaintiff's Opposition
15 to Defendants' Motion for Summary Judgment had not been filed. I further advised that
16 Defendants do not and did not waive any objections to the late filing of the Opposition, or its
17 tardy service on Defendants. A true and correct copy of my letter sent by facsimile is attached
18 hereto as Exhibit 1;

19 7. On the afternoon of April 8, 2008, I received electronic notice from the Court that Plaintiff
20 had filed his Opposition to Defendants' Motion for Summary Judgment. At no time prior to said
21 filing, was I contacted or did I consent to the late filing or service of the Opposition, nor did
22 Opposing Counsel even bother to ask for a stipulation requesting an extension of time;

23 8. On March 6, 2008, in the related State Court Action entitled Montwillo v. Tull, San
24 Francisco Superior Court Action No. 05-442352, a hearing was scheduled on Defendants'
25 Motion for Attorneys Fees as the Prevailing Party. Said Motion was based on Plaintiff's
26 abandonment of his Complaint on the eve of a binding arbitration hearing by filing a dismissal
27 with prejudice of his Complaint;

1 9. At the hearing, presided over by the Honorable Patrick J. Mahoney, the Court verbally
2 chastised Plaintiff's Counsel Stephen Sommers for his actions in attempting to file and submit a
3 lengthy Reply to Defendants' Reply on the morning of the hearing.
4

5 I certify under penalty of perjury under the laws of the United States of America that the
6 foregoing is true and correct, and that I am able to testify competently thereto.
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8 Executed in Mill Valley, California on April 11, 2008.
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10 David Y. Wong



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DAVID Y. WONG

ATTORNEY AT LAW

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April 8, 2008

Via Facsimile

Stephen Sommers
870 Market Street, Suite 1142
San Francisco, CA 94102

Re: *Montwillo v. William Tull, Daniel Gibby and Gibby Novelties, LLC*
USDC Action 07-03947 SI

Dear Mr. Sommers:

In response to your e-mail of yesterday, please be advised that it does not appear you have filed Plaintiff's Opposition to Defendants' Motion for Summary Judgment with the Court.

While your recent e-mail did attach a copy of Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion, I would point out that the third attached document, a print-out of what was sent by e-mail to my office on April 4, confirms that what you actually sent was not Plaintiff's Opposition, but rather Defendants' Opposition to your Motion.

In addition, I would note that the Court's Notice of Electronic Filing, Document No. 46, issued the evening of April 4, identifies the document filed by you as a Memorandum in Opposition to Motion for Summary Judgment. When the Court's system is accessed, however, Document 46 appears to be Defendants' Opposition to Plaintiff's Motion. Hence, it would appear that either you filed the wrong PDF file with the Court, or there has been a serious malfunction in the Court's filing system.

In any case, Defendants' do not waive any objections based on the tardiness of Plaintiff's filing or the prejudice caused by the late service of Plaintiff's Opposition.

Should you have any questions or other concerns regarding the above, please do not hesitate to contact me.

Very truly yours,

David Y. Wong

Cc: M. Greenberg